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No. 660

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IN THE

Supreme Court of the United States

KENNETH JACOBS, FLORENCE KARPF and JONAS MEKAS,

Appellants,

v.

PEOPLE OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE TERM, FIRST JUDICIAL DEPARTMENT

JURISDICTIONAL STATEMENT

EMILE Z. BERMAN,
Attorney for Appellants,
100 William Street,
New York, N. Y. 10038.
212 DI 4-4340

DAVID G. TRAGER,
Of Counsel.

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IN THE

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OCTOBER TERM, 1966

No. .....

KENNETH JACOBS, FLORENCE KARPF and JONAS MEKAS,

Appellants,

vs.

PEOPLE OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE TERM, FIRST JUDICIAL DEPARTMENT

JURISDICTIONAL STATEMENT

Appellants Kenneth Jacobs, Florence Karpf and Jonas Mekas appeal from an order of the Appellate Term of the Supreme Court of the State of New York, First Judicial Department, entered on December 9, 1965, affirming the judgment of conviction of the said appellants for violating New York's obscenity statute (Penal Law § 1141) by showing a motion picture entitled "Flaming Creatures". Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are presented by this appeal.

A. Opinions Below

There were no opinions filed herein in either the Appellate Term of the Supreme Court of the State of New York or in the Criminal Court of the City of New York.

B. Jurisdiction

By an information filed by the District Attorney of New York County, appellants were charged with a violation of §1141 of the Penal Law of the State of New York in that on March 3, 1964 they arranged for or participated in the showing of an allegedly obscene film entitled "Flaming Creatures." Appellants pleaded not guilty and the case was heard by a three-judge bench of the Criminal Court of the City of New York, New York County, on June 2, 1964 and thereafter on June 10, 11, and 12, 1964. On June 12, 1964, the appellants were found guilty of violating § 1141 and on August 7, 1964, a sentence of sixty days in the City Workhouse, with the execution of the sentence suspended, was imposed upon the appellants Kenneth Jacobs and Jonas Mekas. Appellant Florence Karpf received a suspended sentence.

A notice of appeal to the Appellate Term of the Supreme Court of the State of New York, First Judicial Department, was thereafter filed. On December 9, 1965 an order without opinion was entered in that Court affirming the judgment of conviction below [Appendix A]. No further appeal as of right is granted under New York practice. However, leave to appeal to the Court of Appeals may be granted by one of the judges of that Court pursuant to § 520 of the Code of Criminal Procedure of the State of New York. In accordance with New York's procedure, such application was made, but leave was denied in an order entered on April 15, 1966 by the Honorable Stanley H. Fuld, Associate Judge of said Court [Appendix B].

Thereafter, on July 13, 1966, a notice of appeal to this Court was filed in the Criminal Court of the City of New York, New York County, which is the Court possessed of the record on appeal in this case.

Jurisdiction of this appeal is conferred on the Supreme Court by Title 28, United States Code, § 1257(2). *Roth* v. *U. S.* (*Alberts* v. *California*), 354 U. S. 476 (1957); *Smith* v. *California*, 361 U. S. 147 (1959); *Manual Enterprises* v. *Day*, 370 U. S. 478 (1962); *Jacobellis* v. *Ohio*, 378 U. S. 184 (1964); *Freedman* v. *State of Maryland*, 380 U. S. 51 (1965); *Trans-Lux Distributing Corp.* v. *Regents*, 380 U. S. 259 (1965); *A Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. *Attorney-General of Commonwealth of Mass.*, 383 U. S. 413 (1966); *Ginzberg* v. *United States*, 383 U. S. 463 (1966); *Mishkin* v. *People of the State of New York*, 383 U. S. 502 (1966).

C. Statutes Involved

Subdivisions 1 and 2 of § 1141 of the Penal Law of the State of New York, McKinney's New York Laws (1944), *Penal Law*, § 1141, are the pertinent sections of the statute, the validity of which is being challenged in this appeal. The relevant portions of the statute are set forth in Appendix C.

D. Questions Presented

The basic question presented by this appeal is whether § 1141 of the Penal Law of the State of New York is unconstitutional as violative of the "due process" clause of the Fourteenth Amendment and the guarantees of freedom of speech and of the press of the First Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment, because:

1. as construed and applied below, and elsewhere by the New York Court of Appeals, the statute permits the Trial Court to exclude all expert testimony on the issues of (a)

the film's artistic merits, educational value and redeeming social importance, (b) the film's lack of prurient appeal, and (c) its acceptability under "contemporary community standards";

2. as construed and applied herein, and elsewhere by the New York Court of Appeals, the statute permits a holding that "Flaming Creatures" is obscene solely upon the basis that portions of the film portray conduct which if actually engaged in publicly would violate state statutes or public policy;

3. as construed and applied herein, the statute makes completely irrelevant and immaterial the circumstances under which the film was shown, including such matters as the special type of audience that viewed the showing, the nature of the appeal made, the purposes and methods of operation of the Film Makers Cooperative, which is the group that sponsored the showing, and the nature and reputation of the appellants, both professionally and personally; and

4. as construed by the New York Court of Appeals and applied herein, § 1141 permits a criminal obscenity conviction based merely upon knowledge by appellants of the contents of the film irrespective of the fact that the uncontradicted proof demonstrated (a) that appellants believed, in good faith, that "Flaming Creatures" is not obscene and that the film is a work of art and (b) that their showing of the film was in no way an attempt to pander to the prurient interests of their audience.

Related to this question of the validity of § 1141, as authoritatively construed by the courts of New York, there is also presented the additional issue whether the appellants' constitutional rights were violated by the application of § 1141 herein. That is, may appellants' convictions stand and their showing of the film be held criminal, where the film, taken as a whole, had absolutely no appeal to the

prurient interests to the audience present and is also of redeeming social importance and, in addition, the admitted and undisputed evidence of the circumstances under which appellants showed "Flaming Creatures" discloses that, as members of an *avant-garde* filmmaking group, they were seeking only to express a legitimate interest in the art of the cinema†

E. Statement of the Case

On March 3, 1964, a motion picture entitled "Flaming Creatures" (People's Exhibit No. 2) was shown at the New Bowery Theatre at 4 St. Marks Place, New York, New York (R. 20-21).*

Appellant Mekas arranged for the showing of the film (R. 79), appellant Jacobs conducted the actual showing (R. 28-31) and appellant Karpf acted as "ticket seller" (R. 21-22, 36-40). Each appellant knew the contents of the film, but each denied to the arresting officers that he or she thought the film was obscene (R. 35, 78-80).

In its case in chief, the People called only two witnesses —the arresting officers. Through them, the People proved the above facts which are not contested by appellants. However, throughout the trial and on appeal, appellants contended that § 1141 was unconstitutional on four principal grounds.

1. At the trial, the People offered no evidence on the issue of obscenity other than the film itself. The People offered no proof that the film appealed predominantly to prurient interests, violated contemporary community standards, and was without redeeming social importance. This alone required dismissal of the charge when appellants moved at the close of the People's case to dismiss the in-

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* All parenthetical references are to pages in the Record on Appeal, unless otherwise indicated by context.

formation and complaint upon the ground that the People had not made out a *prima facie* case because of this failure of proof. (R. 93-94 and 97-100; *Freedman* v. *Maryland, supra; Kahm* v. *United States,* 300 F. 2d 78 (5th Cir. 1962); and *United States* v. *Klaw,* 350 F. 2d 155 (2d Cir. 1965).)

This error was compounded when the trial court ruled inadmissible appellants' offers of proof during their case on the issue of obscenity. Expert testimony on each of the following issues was rejected: (a) The film was in fact utterly lacking in prurient appeal and that it did not have any capacity whatsoever to arouse or excite or impel the viewer to abnormal, unusual or anti-social behavior. (b) The film did not have the characteristics of "hard-core" pornography. (c) There were other films being shown throughout New York City and the nation which were similar to "Flaming Creatures" in their depiction of sex and nudity and that the community accepts or tolerates these films. (d) Most important, that the film was of artistic merit, educational value, cultural importance, and, in a phrase, of "redeeming social importance." (See offers of proof, pp. 137, 184; also, specifically, 145-47, 148-49, 167-68, 171, 184, 196-98, 199, 239, 240, 275.)

Testimony on these issues was offered through many persons well qualified because of their vast backgrounds in the theater, movies, the arts, education and psychiatry, to express their opinions on these vital issues in an obscenity case. These persons whose qualifications were not challenged (R. 135-36, 152, 158-59, 161) included Louis Allen, a well-known theater and film producer (R. 137-162); Willard Van Dyke, noted documentary motion picture producer (R. 162-72); Herman Weinberg, film historian and film teacher (R. 172-87); Susan Sontag, a leading reviewer of films and writer and teacher; Allen Ginsberg, one of America's foremost contemporary poets (R. 270-272); and Joseph Kaster, teacher of cultural history of ancient societies and member of the faculty of the New School for Social Research (R.

244-53). In addition, evidence on the psychological issues was proffered in the form of testimony by Drs. Edward Hornick and John Thompson, psychiatrists, the latter being an Associate Professor at the Albert Einstein School of Medicine, Yeshiva University in New York City (R. 282-84).

In each case, this tender of proof was excluded by the Court upon objection, which rejection was upheld on appeal.

Appellants argued below (Point I of appellants' brief in the Appellate Term) that if § 1141 excluded such expert testimony, the statute was unconstitutional since it deprived them of the opportunity to be heard on the key issue in their case, namely, whether "Flamingo Creatures" was obscene under the tests promulgated by this Court in and since its decision in *Roth* v. *United States*. Thus, the decision below, if permitted to stand, not only would effectively operate to deny appellants the most fundamental right in a criminal proceeding, i.e., "an opportunity to be heard" (*Smith* v. *California*, 361 U. S. 147, 171 (concurring opinion of Harlan, J.), but it also would nullify the First Amendment's protection of works of "redeeming social importance". Although the function of the judges who must decide obscenity cases is to determine the ultimate issue of obscenity, they must do so on the basis of testimony in the record on this issue. A judge should not be permitted to substitute his personal views as to whether the work in question has artistic merits or whether it violates contemporary community standards in its depiction of sex or nudity. If judges are to be allowed to make decisions on the basis of barren records, their decisions will of necessity reflect only their personal predilections. To make matters worse, these decisions will be on a subject that, by choice or circumstances or both, most judges are generally unqualified to render because of their limited experience or knowledge of the latest developments in the arts.

In *Dunn* v. *Maryland State Board of Censors*, 240 Md. 249, 213 A. 2d 751 (1965), the Court of Appeals said:

> "In our view, neither the judge who may sit in the Circuit Court to review the action of the Board nor the judges of this court ordinarily would be qualified to determine whether a film exceeded these constitutional standards or tests without enlightening testimony on these points." (213 A. 2d at p. 754)

See also concurring opinion of Frankfurter, J. in *Smith* v. *California*, 361 U. S. 147 at page 165 ff.; *Kahm* v. *United States*, 300 F. 2d 78 (5th Cir. 1962); *United States* v. *West Coast News Co.*, 228 F. Supp. 171 (W. D. Mich. 1964); *Yudkin* v. *State*, 229 Md. 223, 182 A. 2d 798 (1962); *In re Harris*, 56 Cal. 2d 879, 16 Cal. Rptr. 889, 366 P. 2d 305 (Cal. 1961). Compare, however, *Womack* v. *United States*, 294 F. 2d 204 (D. C. Cir. 1961) and the cases relied upon by the People in the Courts below (R. 110; Point II of appellee's brief in the Appellate Term); *People* v. *Muller*, 96 N. Y. 408 (1884); *People* v. *Finkelstein*, 11 N. Y. 2d 300 (1962) and *People* v. *Shapiro*, 6 A. D. 2d 271 (2d Dept. 1958).

At the trial, appellants were able to introduce two minor pieces of evidence of the film's "redeeming social importance" and its lack of prurient appeal. The first was a review of the film that was published in the Nation magazine on April 13, 1964, written by Miss Susan Sontag (Dfdts' Ex. E, p. 375, col. 2). In that review, Miss Sontag stated that the film was in no sense an appeal to the prurient, but was rather "a brilliant spoof on sex" (p. 375, col. 3) and that the incidents portrayed were not intended to arouse but were included solely for a legitimate artistic purpose (p. 376, col. 1).

> "*Flaming Creatures* is a triumphant example of an esthetic vision of the world—and such a vision is perhaps always, at its core, epicene. But this type of art

has still to be understood in this country. The space in which *Flaming Creatures* moves is not the space of moral ideas, which is where American critics have traditionally located art. What I am urging is that there is not only moral space, by whose laws *Flaming Creatures* would indeed come off badly; there is also esthetic space, the space of pleasure. Here Smith's film moves and has its being." (p. 376, col. 3)

In addition, Dr. Kaster pointed out that the film paralleled the ancient Dionysian myth, giving it sufficient educational value for him to show it to his classes at the New School (R. 248-49).

This limited proof was received in evidence only because the People chose not to object (see discussion, R. 160-61). In no sense did this constitute an adequate opportunity to be heard for it was but an insignificant portion of the proof appellants were prepared to offer on the issue of obscenity. The upholding of this arbitrary and unjustified exclusion of this evidence will have the inevitable result of making the First Amendment's protection of cultural freedom an empty exhortation.

2. Appellants' second contention is that New York's test for obscenity for films as authoritatively enunciated by its highest state court and specifically applied herein violates the First Amendment in two respects and is therefore constitutionally defective.

In the court below, the People relied principally on the decision of the New York Court of Appeals in *Trans-Lux Distr. Corp.* v. *Board of Regents*, 14 N. Y. 2d 88 (1964), which held that if any scene of any film portrayed any conduct which, if actually engaged in publicly, would violate a state statute or public policy, then the film was obscene. Although this Court reversed the judgment in the *Trans-Lux* case, the reversal was on other grounds and the *Trans-Lux* case was the principal case relied upon by the

People in the Court below as stating the law of New York as of the present date and in this criminal obscenity prosecution under § 1141 (R. 112 and Point I of the Appellee's Brief in the Appellate Term).

This "*per se*" test of obscenity violates two important tests of obscenity that have been promulgated by the Supreme Court. First, it violates the command of this Court that a work be judged as a whole, Second, it rejects consideration of artistic merit, intellectual content, cultural value and other pertinent factors. Therefore, as so authoritatively construed, § 1141 is unconstitutional.

3. Furthermore, § 1141 as construed and applied herein is unconstitutional because in a *criminal* obscenity case, the Court should have considered appellants' conduct as a whole and not just the contents of the film itself. The special nature of the audience that attended the group's showings; the purpose and methods of operation of the Filmmakers Cooperative; the nature of the appeal made; the appellants' purposes and intent; and the entire spectrum of facts surrounding the showings should have been weighed by the Courts below in determining whether appellants' conduct was criminal.

In *Roth* v. *United States,* Chief Justic Warren, concurring, wrote:

> "But there is more to these cases. It is not the book that is on trial; it is a person. The conduct of a defendant is the central issue, not the obscenity of the book or a picture. Each of the materials is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting." (354 U. S. at p. 495)

The Chief Justice, thus pointed out, that the issue for decision in a criminal obscenity case is far different from

that presented in a case involving the obscenity of a work on its face. (See, e.g., *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General, supra.*) Any thoughtful discussion of obscenity must commence with the recognition that the concept has meaning only in context. The same material may or may not be obscene only when it is considered against the background of its showing or distribution.

This concept, which has been called the theory of "variable obscenity", is fully explored in Professors Lockhart and McClure's oft-cited article, *Censorship of Obscenity, The Developing Constitutional Standards*, 45 Minn. Law Rev. 5, where the authors wrote:

> "Variable obscenity provides solutions to most of the problems that constant obscenity leaves unresolved. Under variable obscenity, materials are judged by its appeal to and effect upon the audience to which the audience was primarily directed. In this view, material is never inherently obscene; instead, its obscenity varies with the circumstances of its dissemination. Material may be obscene when directed to one class of person but not when directed to another . . .". (p. 77)

In line with this reasoning, appellants sought to show at the trial; (1) that "Flaming Creatures" was not an attempt to pander to prurient interests; (2) that the film was sponsored by a group of cinematographers called the Film Makers Cooperative and that the showing was for the benefit of the maker of the film, Jack Smith (R. 259); (3) that the Film Makers Cooperative put on various programs of experimental films dealing with various subjects and that the Cooperative seeks to gain distribution of their members' *avant garde* film works (R. 238, 257-58); and (4) that in fact appellants were in no way seeking to pander to any prurient interests, but rather were a group that had made important contributions to the cultural life of our country and in the recent development of

the cinema in the United States. The appellant Mekas was the leader of this group (R. 238-39, 265). Although much of this testimony did come into the record, the Court did exclude testimony which would have explained fully the important role that the Film Makers Cooperative had played in the cultural life of the City of New York and the development of the film as a form of art (R. 256); the varied nature of the films made by the Film Makers Cooperative; their sincerity of purpose (R. 241); the recognition that the members of the group had received (R. 255-256); the sincerity of purpose of the film maker and his artistic standing (R. 205-206); the advanced audience to which the work was primarily directed (R. 256-257; 262-263); and whether or not the appellants were panderers of smut (R. 141, 144, 185-186, 251). It was generally the appellants' contention that it was in the setting of an *avant garde* group sincerely devoted to the arts that the conduct of the appellants should be judged.

In the instant case, we have a film the showing of which was motivated by a legitimate artistic purpose and not for the commercial exploitation of sex in cinema (Cf. *Ginzberg* v. *United States*, 383 U. S. 463). This factor is entitled to grant weight when judging whether the appellants engaged in criminal conduct when they arranged for the showing of a film made by a member of the Film Makers Cooperative. For it is the appellants who were tried, not the film. Since § 1141, as construed and applied by the courts of New York, holds such considerations irrelevant and immaterial, the statute imposes criminal sanctions upon the legitimate exercise of the First Amendment's guarantee of the right of free artistic expression, and, accordingly, is unconstitutional.

4. As construed below and by the Court of Appeals in other cases § 1141 is also unconstitutional since its requirement of *scienter* is so minimal that it has a debilitating effect upon the exercise of First Amendment rights.

Last term, in *Mishkin* v. *New York*, 383 U. S. 502, this Court had occasion to discuss the *scienter* requirement of § 1141. There, appellant urged that the section was unconstitutionally narrow since it permitted conviction so long as the defendant merely knew the contents of the material. This Court, however, in affirming the conviction, interpreted the decisions of the New York Court of Appeals as "authoritatively" holding the *scienter* requirement of § 1141 to be more exacting. The opinion quoted is *People* v. *Finkelstein*, 9 N. Y. 2d 342 (1961), where the Court of Appeals stated:

> "A reading of the statute (§ 1141) as a whole clearly indicates that only those who are in some manner aware of the character of the material they attempt to distribute, should be punished. It is not innocent but calculated purveyance of filth which is exercised. . . ."

Furthermore, in a footnote (86 S. Ct. at p. 964, ftn. 9), the opinion interpreted Judge Froessel's "parenthetical reference to knowledge of the contents of the books and the second *Finkelstein* case as not being intended to be a 'modification' of the above." It is respectfully contended that the Supreme Court's interpretation of New York law on the issue of *scienter* was not applied in this instance for the Court below has construed § 1141 to permit conviction based upon mere knowledge alone. This was the position urged by the People in the Appellate Term (Point I (B) of the Appellee's brief). That this is the law in New York is demonstrated by the fact that the convictions herein were based solely upon the conceded fact that the appellants knew the contents of the film. However, the uncontradicted proof was that each of them thought the film was a work of art and was not obscene. The honesty of this belief is supported by the circumstances under which the film was shown. The appellants were in no way commercializing on or seeking to pander to their audience's

prurient interests and there was no "calculated purveyance of filth." Therefore, it is respectfully submitted that the People's interpretation of § 1141 was the one followed herein and, as such, violates the First and Fourteenth Amendments to the Constitution since it imposes criminal sanctions upon those who in good faith seek to exercise their First Amendment rights.

Thus, for each of the four reasons stated above, it is respectfully submitted that § 1141 of the Penal Law of the State of New York, as authoritatively construed, is unconstitutional.

F. The Federal Questions Involved on This Appeal Are Substantial

It is respectfully submitted that the foregoing discussion demonstrates that the questions raised by this appeal involve substantial federal questions. In all of the previous cases where the Supreme Court has ruled on the question of obscenity, it has not been denied the benefit of expert testimony on the issue of artistic merit and other redeeming social importance—where it has been offered. Here, appellants were denied the opportunity to offer evidence on this issue as well as the related issues of prurient appeal and contemporary community standards. We submit that the procedure that is to be followed in obscenity prosecutions is of vital importance. The concern is not alone with the question of denying appellants their day in Court. Basically the issue is that if appellants are not permitted to offer evidence on these vital issues, the stringent tests laid down by this Court to limit the scope of obscenity statutes in order to protect First Amendment rights will prove utterly worthless in their application. The Supreme Court cannot possibly review every obscenity case. Consequently, an explicit requirement that the trial courts must consider and be bound by the testimony offered will provide a needed control. The ruling below permits the trial court

to decide obscenity cases on the basis of the personal moral sensibilities of each judge.

As to the issue of the obscenity of the film itself, there can be no doubt that in dealing with films, New York has deviated from the tests for obscenity enunciated by this Court in various decisions since the *Roth* case and especially this Court's decision in the *Jacobellis* case—that all works are protected unless they are "*utterly* without redeeming social importance." *Jacobellis* v. *Ohio*, 378 U. S. 184 at page 191.

The issue concerning the relevance and materiality of the conduct of the appellants and their purposes and intent is significant as a necessary measure to protect and to encourage the cultural and artistic life of the country. There can be no doubt that the affirmance of this conviction will have a "chilling effect" upon the experimental cinema of our country.

On the issue of *scienter*, it is respectfully submitted that the issue of the minimum constitutional requirement of *scienter*, which this Court expressly left open in *Smith* v. *California*, should now be resolved. The proof here was that the appellants were in no way engaged in pandering to prurient interests. In *Mishkin*, the proof was adequate to support the conviction based upon any requirement of *scienter*. Here, the uncontradicted evidence is otherwise; yet the conviction was upheld. Protection of First Amendment rights requires a stricter standard of *scienter* than that afforded by § 1141.

Finally, appellants urge that the attempt by the appellant Mekas and his colleagues to raise the artistic level of the cinema in the United States has been an important contribution to the cultural life of this country and, more directly, to the *avant-garde* cinema. The attack upon cultural freedom which this prosecution represents should not be validated by this Court which has in the past steadfastly

recognized the importance of legitimate artistic intent and expression. A free society requires cultural freedom and the First Amendment protects this ideal. It is therefore respectfully submitted that these convictions should not be upheld.

CONCLUSION

This appeal presents substantial federal questions. It is respectfully requested that the Court note probable jurisdiction and reverse the judgment below.

Respectfully submitted,

EMILE Z. BERMAN,
Attorney for Appellants.

DAVID G. TRAGER,
Of Counsel.

APPENDIX A

Order of Appellate Term.

At an Appellate Term of the Supreme Court, First Department, held on the County Court House, Borough of Manhattan, City of New York, on the 9th day of December 1965.

Present: Hon. Samuel H. Hofstadter, Justice Presiding,
" George Tilzer,
" William C. Hecht, Jr.,
Justices.

September No. 54

The People of the State of New York,

Respondent,

vs.

Kenneth Jacobs, Florence Karpf and Jonas Mekas,

Defendants-Appellants.

An appeal having been taken to this court by defendants from judgments of conviction of the Criminal Court of the City of New York, County of New York, after trial before Hon. S. Impelliteri, Castaldi, Rohan, on the 12th day of June 1964, upon the charge of violating Penal Law § 1141, and having been sentenced by Hon. Silver, Greenfield, Whitman, on the 7th day of August, 1964, as follows:

Jacobs & Mekas—each received 60 days in the workhouse, execution of sentence suspended.

and the said appeal having been heard and due deliberation having been had thereon,

IT IS ORDERED AND ADJUDGED that the said judgments so appealed from be and the same are hereby affirmed.

Enter,

SAMUEL H. HOFSTADTER,
Jutice Appellate Term,
Supreme Court, First Department.

APPENDIX B

Certificate Denying Leave.

STATE OF NEW YORK,
COURT OF APPEALS.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

KENNETH JACOBS, FLORENCE KARPF and JONAS MEKAS,

Defendants-Appellants.

I, STANLEY H. FULD, Associate Judge of the Court of Appeals of the State of New York, certify that the above-named appellants, through their attorney, Emile Z. Berman, Esq., after notice to the District Attorney of New York County, and within the time and in the manner prescribed by section 520. of the Code of Criminal Procedure, duly presented to me an application for a certificate that questions of law were involved in the above matter which ought to be reviewed by the Court of Appeals. In such application, seeking leave to appeal from the order of the Appellate Term of the Supreme Court of the State of New York, entered on the 9th day of December, 1965, affirming the judgment of the Criminal Court of the City of New York, convicting the appellants of a violation of section 1141 of the Penal Law, it was argued that their convictions violated their rights under the First and Fourteenth Amendments of the United States Constitution in that (1) the film upon which the convictions were predicated was not obscene within the meaning of the statute; (2) expert testimony

with respect to contemporary community standards should not have been excluded; and (3) the statute as to scienter was unconstitutionally narrow because criminality was predicated upon the showing of a film which the appellants in good faith believed not to be obscene.

After hearing counsel and upon the record and proceedings herein, I am denying permission to appeal because, in my opinion, no question of law is presented which ought to be reviewed by the Court of Appeals.

Dated at New York, New York, April 15, 1966.

STANLEY H. FULD,
Associate Judge of Court of Appeals.

APPENDIX C

Statutes.

Penal Law

§ 1141. Obscene prints and articles

1. A person who sells, lends, gives away, distributes, shows or transmutes, or offers to sell, lend, give away, distribute, show or transmute, or has in his possession with intent to sell, lend, distribute, give away, show or transmute, or advertise in any manner, or who otherwise offers for loan, gift, sale or distribution, any obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic or disgusting book, magazine, pamphlet, newspaper, story paper, writing, paper, card, phonograph record, picture, drawing, photograph, motion picture film, figure, image, phonograph record or wire or tape recording, or any written, printed or recorded matter of an indecent character which may or may not require mechanical or other means to be transmuted into auditory, visual or sensory representations of such character; or any article or instrument of indecent or immoral use, or purporting to be for indecent or immoral use or purpose, or who designs, copies, draws, photographs, poses for, prints, utters, publishes, or in any manner manufactures, or prepares any such book, picture, drawing, photograph, motion picture film, magazine, pamphlet, newspaper, story, writing, paper, card, phonograph, record, figure, image recording, matter, article or thing, or who writes, prints, publishes, or utters, or causes to be written, printed, published, or uttered, any advertisement or notice of any kind, giving information, directly or indirectly, stating, or purporting so to do, where, how, of whom, or by what means any, or what purports to be any, obscene, lewd lascivious[1]

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[1] So in original. A comma probably should follow "lascivious".

filthy, disgusting or indecent books, picture, photograph, motion picture film, writing, paper, card, phonograph record, figure, image, recording, matter, article or thing, named in this section can be purchased, obtained or had or who has in his possession, any slot machine, motion picture projector or other mechanical contrivance with moving pictures of nude or partly denuded female figures which pictures are lewd, obscene, indecent or immoral, or other lewd, obscene, indecent or immoral drawing, image, recording, article or object, or who shows, advertises, exhibits or transmutes the same, or causes the same to be shown, advertised, exhibited or transmuted, or who buys, owns or holds any such machine with the intent to show, advertise, transmute, or in any manner exhibit the same; provided, that this subdivision shall not apply to motion picture films licensed by the state department of education; or who,

2. In any manner, hires, employs, uses or permits any person to do or assist in doing any act or thing mentioned in this section, or any of them,

Is guilty of a misdemeanor, and, upon conviction, shall be sentenced to not less than ten days nor more than one year imprisonment or be fined not less than one hundred fifty dollars nor more than two thousand dollars or both fine and imprisonment for the first offense; for a second offense, shall be sentenced to not less than thirty days nor more than one year or be fined not less than two hundred fifty dollars nor more than three thousand dollars or be both fined and imprisoned; for a third offense, shall be sentenced to an indeterminate term of not less than six months nor more than three years and in addition thereto may be fined not more than five thousand dollars.